"Dear Sir:

"An order, of which you have been notified, directing your deportation from the United States was entered on April 25, 1952,[6] on the following grounds:

"'The Immigration Act of May 26, 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

"'The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.'

"*Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation.*

"In this connection you are reminded that Section 23 of the Internal Security Act of 1950, which was enacted by Congress on September 23, 1950 declares that any such alien 'who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of' that Act 'whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the

[6] This was in fact the date of the formal warrant for deportation and not of any deportation order (R. 112).

> Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony. Provided, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: * * * .
>
> "Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950." (Exhibit 6, R. 74-75).

On February 12, 1953, petitioner was interviewed by officials of the Service and gave them a sworn statement (R. 94-5). Petitioner did not have counsel present at the time of this interview, nor was he advised of his right to have counsel (R. 96). This statement (Exh. 8, R. 98-107), was the sole evidence introduced by the government to show that petitioner had failed to depart or make timely application for travel documents.

In this statement, petitioner said that he had informed his attorney of the visit from Mr. Maki and of his understanding as a result of that interview "that whenever I have to personally start to do something to get a passport I will be officially informed"; and that his attorney replied that petitioner should wait "until you get official information from the immigration authorities" (R. 102-3). The statement continued as follows (R. 103-5):

> "Q. Since receipt of the letter on Form I-229 dated April 30, 1952, did you depart from the

United States in the required six months period thereafter?

A. No.

Q. Have you departed from the United States at any time since April 30, 1952?

A. No, I have just been waiting for instructions from the immigration authorities.

Q. But you had already been given appropriate instructions in writing in the letter of April 30, 1952. What made you believe you would get any other instructions relative to your departure from the United States?

A. The discussion with Mr. Maki at our office gave me the impression that he will write to the officials in Canada and Finland and in case he will not succeed, then he will inform that I will have to do it myself.

Q. Didn't Mr. Maki of the Duluth immigration office merely interview you at that time to execute an immigration form with which the Immigration and Naturalization Service was proceeding independently of any efforts of yourself, to deport you from the United States?

A. No, this was not the understanding. Mr. Maki told me at first he will write to Canada and find out whether they will accept me because my last citizenship was Canadian. Mr. Maki stated that apparently it would take about two months to get the official answer from there. Then he stated he has start to a correspondence with the Consul General of Finland in New York and if he does not succeed to get an affirmative answer then it will befall upon me to apply personally, to make an application for a visa to Finland. That was the essence—we had a lengthy discussion.

Q. Did not Mr. Maki call your attention at the time of that interview with you, that you would have to proceed independently and simultaneously to apply for a passport with which to leave the United States, within the six months period of time commencing April 25, 1952?

A. At least I did not understand so.

Q. At your deportation hearing, what country did you specify to which you should be deported if you were ordered deported from the United States?

A. To my native country, Finland.

Q. During the six months period commencing April 25, 1952, did you make any effort to obtain a passport or other travel document with which to enter Finland or any other country?

A. No, because I was waiting for word from the immigration office.

Q. Have you made any effort to secure a passport or other travel document with which to depart from the United States at any time since April 30, 1952?

A. No, because of the reasons that I have stated.

Q. Since the order of deportation was entered against you on April 25, 1952, did you receive any request from the Immigration and Naturalization Service to execute any passport application other than the interview with Mr. Maki of this office some time last summer when he apparently merely filled out an immigration form with which to present your case for issuance of travel documents to enter either Canada or Finland?

A. No, and in fact I have been wondering about that myself.

Q. Did you wilfully refuse to depart from the United States within the six months period commencing on April 25, 1952, as required by the law?

A. No.

Did you wilfully fail to depart from the United States within the six months period commencing on April 25, 1952, as was required of you by law?

A. By no means, no.

Q. Did you wilfully refuse to apply in good faith during the required period of time in your case, for a passport or other travel document which you could depart from the United States by October 25, 1952?

A. No.

Q. Why did you fail to make timely application for a passport and to depart from the United States by October 25, 1952 as required by law in your case?

A. Just because I was waiting for instructions from Mr. Maki as to when I should start to make application for a passport. In case the Service had failed to get a visa or passport."

The petitioner further stated that he wanted to cooperate with the Attorney General to secure a passport for Finland, but that if the Attorney General wished him to depart to some other country, he would wish to consult with his attorney before stating his position (R. 105).

Mr. Maki testified for the government that he could not recall the details of his interview with the petitioner on or about April 18, 1952 (R. 134). He denied, however, that he had specifically told the petitioner that he need do nothing to obtain travel documents until he received notice from the Service (R. 131). He acknowledged that he did inform the petitioner that the purpose of his visit was to obtain information which would be forwarded to the Chicago office of the Service so that it might take the necessary steps to obtain travel documents (R. 128, 138, 144-5). Maki acknowledged that he did not know whether the petitioner could have obtained travel documents by any other channels or whether it was necessary for him to proceed through the Service (R. 146). This latter testimony thus corroborated petitioner's sworn statement (R. 103-4) that Maki did not inform him that he had to proceed independently of the Service to apply for travel documents.

A prior conviction of the petitioner upon the same indictment had been reversed by the Seventh Circuit on the ground that the trial court had not considered the validity of the underlying deportation order. *United States* v. *Heikkinen*, 221 F. 2d 890. Upon the retrial, the record of the deportation hearings (Exh. 1) was introduced into evidence (R. 36). The trial judge reviewed that record and held that the evidence therein supported the findings of the immigration officials and that the deportation order was valid (R. 47). He ruled that the validity of the order should not be submitted to the jury (R. 56-64), and he instructed the jury that the deportation order had been validly entered after a hearing in which the petitioner had been accorded due process of law (R. 166-7).

The petitioner was convicted on both counts of the indictment (R. 172).

After the petitioner had been indicted in the present proceedings he did in fact secure travel documents to return to Finland. He was prevented from departing to Finland, however, by his indictment and the necessity of his remaining in this country to stand trial. At the time of sentencing, petitioner's counsel indicated that petitioner was anxious to have an opportunity to apply again for travel documents to Finland so that he could depart to Finland. Accordingly, his trial counsel requested that sentence be suspended at least long enough to give him that opportunity. (R. 174.) The trial court rejected this request. Instead, he sentenced the petitioner to a five year prison term on the first count. Imposition of sentence on the second count was deferred by the trial court until completion of the sentence on count one and "until I determine

whether or not he has made an honest application and an effort to leave this country and to comply with that order." (R. 175.)

SUMMARY OF ARGUMENT

I.

A. Petitioner together with an official of the Immigration Service filled out the Service form, "Passport Data for Alien Deportees," in order to enable the Service to obtain travel documents in accordance with its usual practice. Since the form was designed to be used for obtaining travel documents, petitioner, by causing it to be completed, thereby obviously made an application for travel documents. There is no evidence that any other step was necessary or useful to secure travel documents.

The thesis of the government is that the petitioner was delinquent because he failed to make an application directly to Finland. But there is no evidence that Finland required (or even accepted) direct applications and that it did not recognize applications channelled through the Service. Moreover, the government introduced no evidence as to what petitioner was required to do to make a proper application for travel documents. Hence, petitioner was convicted for failing to take some utterly undefined action which was not shown to be either necessary, useful or appropriate for the obtaining of travel documents. The petitioner completed the only application form he was asked to complete and which was necessary for obtaining travel documents. He therefore did not fail to apply for travel documents.

B. Petitioner was convicted of a failure to depart on evidence and under instructions which authorized a conviction of this crime solely on proof of a failure to apply for travel documents. But since the statute has another specific provision punishing the latter failure, the failure-to-depart clause must be construed to apply only to aliens who fail to depart after travel documents have been obtained or if travel documents are unnecessary.

This limiting construction is impelled by the principles that penal statutes must be strictly construed, that a cumulation of offenses for the same transaction is not favored, and that a general provision will normally not be construed to include specific prohibitions in the same enactment. The government's reading of the statute conflicts with the prohibition against double jeopardy, since it makes two offenses out of the identical conduct of willful failure to apply for travel documents.

C. Since the crimes involved are *willful* failures, it was necessary for the government to prove that the omissions were done with specific intent and with the purpose of disobeying or disregarding the law. The evidence in this case negates willfulness.

Petitioner explained his failure to take action on the ground that he had obtained the impression from his interview with Maki that he need do nothing further until he heard from the Service. This statement is exculpatory, there was no conflicting evidence, and petitioner's assertion of good faith is corroborated by Maki's testimony and by the Service's letter of April 30.

If the Service actually wished petitioner to make direct application to Finland for travel documents on his own, it should have told him so. It did not do so. Instead, it affirmatively induced petitioner to believe that he need take no further action, and then pounced on him for the inaction it had induced.

II

A. The chief factual issue before the jury was whether petitioner's failure to take any action subsequent to his interview with Maki, was due to his honest belief that the matter was in the hands of the government, or whether this failure was with knowledge by petitioner that he was obliged to take independent action. The trial court failed to instruct the jury on the issue.

B. The trial court's instructions authorized the jury to convict even if petitioner's failures were done innocently and in good faith. Thereby the court erroneously eliminated the requirement, arising from the statutory term "wilful", that the failures had to be committed with specific intent and for the purpose of disobeying and disregarding the law.

This elimination of criminal intent was aggravated by the further instruction to the jury that there was no duty on the part of the government to assist the petitioner in effecting his departure, and that there was an affirmative duty on the part of the petitioner to obtain travel documents. Under this view, the petitioner was guilty even if his failure to take action was a result of his good faith reliance upon the belief that the government was taking the necessary steps and would inform him if it desired further action on his part.

III

The trial court's fallacious view that the issue in the case was one of petitioner's duty as against the government's duty also caused him to err in refusing to grant the petitioner access to the records of the Service to determine what efforts the Service had made to secure travel documents and what success had attended such efforts. This ruling was tantamount to holding that the Service was entitled to act in bad faith and that petitioner could be convicted for failing to apply for documents which, for all that appears, had been obtained or were impossible to obtain.

IV

The sole evidence to support the conviction was petitioner's statement to the Service, given as the result of an interview which took place without benefit of counsel. There being no evidence of guilt other than this statement, the judgment below violates the rule that an uncorroborated confession will not support a conviction in the federal courts.

V

The statute here is unique in its specific provision for suspension of sentence and its listing of detailed standards for determining whether sentence should be suspended. Under these standards, the circumstances of this case obviously called for a suspended sentence conditioned on the petitioner's making application for travel documents and departing from the country. The trial court, however, imposed a savage sentence in disregard of the statutory standards, and on the basis of his own standards. This denial of suspension, being in conflict with the statutory standards, is subject to

appellate review, being as much a violation of the legislative will as imprisonment for a term in excess of the statutory maximum.

VI

Petitioner was ordered deported under a provision added to the Immigration Act of October 16, 1918 by section 22 of the Internal Security Act of 1950; 64 Stat. 1006. The statute under which he was convicted is applicable to "Any alien against whom an order of deportation is outstanding under the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137) . . ." Prior to the amendment provided in 64 Stat. 1006, neither the original Act of October 16, 1918 nor the cited amendments provided for deportation for past membership in the Communist Party. Hence, by its terms, the statute does not apply to petitioner.

As a criminal statute, it should be strictly construed and not extended beyond its express terms. The reference to the Act of October 16, 1918, as amended must be limited to that Act as it read at the time of the consideration of the statute. Moreover, the specific references to the amendments to the 1918 Act must be construed as limiting the applicability of the statute to these amendment. A contrary construction would render such references meaningless, and such a construction is not favored.

VII

A. The statute contemplates punishment of an alien who has committed two transgressions: (1) engaging in conduct which is cause for expulsion, and (2) willfully failing to effectuate or facilitate departure after

having been ordered expelled. The first of these elements is committed to administrative, rather than judicial, determination. Thereby the statute conflicts with the constitutional requirement that no person may be punished except after a judicial trial of all elements of the alleged offense. A deportation proceeding does not involve an administrative regulation of general and future application, but rather an administrative adjudication that the particular alien has in the past committed a specific act which has become a cause for deportation.

Because of this splitting of the offense, the accused is deprived in the deportation proceeding which adjudicates the first element of the crime of the following constitutional guarantees: the right of trial by jury, the right against double jeopardy, the right to be confronted with the witnesses against him, the right to bail pending trial, the right that failure to testify not be evidence of guilt; the rights that guilt must be proven beyond a reasonable doubt and may not be determined before one who acts as both judge and prosecutor.

Administrative adjudication of deportability for the purpose of alien expulsion has been sustained on the premise that deportation is not punishment. In this statute, deportability is one of the elements which subjects the alien to lengthy imprisonment for an infamous crime. Since imprisonment for a fixed term is clearly punishment, it can not be imposed on an administrative adjudication, but only after a judicial trial in which a jury determines the issue of deportability.

B. Expulsion of a resident alien for past conduct which when engaged in was not cause for deportation

and which does not rationally justify a conclusion that his continued residence will be detrimental to the community, has been sustained against charges of lack of due process and violation of the prohibition against ex post facto laws, on the grounds that deportation is not penal and that there are few if any due process restrictions on Congress' authority to determine which aliens are undesirable residents. This reasoning completely breaks down when, as in the case of this statute, imprisonment is a consequence of conduct causing deportability.

Here the petitioner has been convicted for a crime of which one element was that he belonged to the Communist Party between 1922 and 1930. The statute punishing him for his conduct, in conjunction with other conduct, was enacted in 1950, as was the provision making such membership a cause for deportation. Petitioner is being punished by an ex post facto law. Since he is being punished for past membership in a specifically named organization, he is being imprisoned under a bill of attainder. His punishment for organizational membership violates the First Amendment. And since petitioner's past Communist Party membership standing alone does not supply a rational basis for concluding that his continued presence in the country is detrimental, it violates substantive due process to imprison him for failing to depart from the country.

ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT ON EITHER COUNT

A. The Evidence Does Not Show a Failure to Apply for Travel Documents

The second count of the indictment alleged that petitioner willfully failed "to make timely application in good faith for travel or other documents necessary to his departure." According to the government's own evidence, nine days after the Board of Immigration Appeals sustained the deportation order, petitioner and an official of the Immigration and Naturalization Service filled out the Service form, "Passport Data for Alien Deportees." This form, as its title indicates, is regularly used by the Service to obtain travel documents, and petititioner was told that the executed form would be used for that purpose. The government's evidence also showed that the government has in many cases obtained travel documents for deportation of an alien on the basis of such form (R. 138-141).

Since the form was designed to be used for obtaining travel documents, petitioner, by causing it to be completed, thereby obviously made an application for travel documents. *United States* v. *Spector*, 343 U.S. 169, holds that the requirements of the country of destination determine what constitutes necessary travel documents and the application therefor. In the present case, the government introduced no evidence of what Finland, the country of destination, required by way of an application for a passport or visa. There is no basis for concluding that it required anything other than the Passport Data form which petitioner completed. On the contrary, the evidence indicates that the Passport Data form was all the application that

was necessary to obtain travel documents. After the form was completed, the Service wrote petitioner that "arrangements to effect your deportation pursuant to such order [of deportation] are being made and when completed you will be notified when and where to present your self for deportation." Surely this shows that the Service, more familiar with deportation procedures than petitioner, had no need for anything else as an application for travel documents. Furthermore, the government's own witness, Maki, testified that he did not know whether petitioner could have obtained travel documents without going through Service channels (R. 146).

Thus it appears that (1) petitioner did apply for travel documents by filling out the Service form; and (2) there is no evidence that any other step was necessary, useful, or appropriate to make application for travel documents. Hence there is no evidence of a failure to apply for travel documents.

At the trial, the thesis of the government and the judge was that petitioner was delinquent because he had not made an application directly to the Finnish authorities. This position is unsound if only because there is no evidence that Finland required (or even accepted) direct applications and that it did not recognize applications channelled through the Service.

Spector held that the statute was not unconstitutionally vague because the passport or visa requirements of the country of destination are ascertainable. But this presupposes that evidence of these requirements will be introduced, so that the jury will have something definite to apply in determining whether the accused actually did make application for travel

documents. No such evidence was introduced here, and thus the statute was made unconstitutionally vague in its application. Petitioner was convicted for failing to take some utterly undefined action which was not shown to be either necessary, useful or appropriate for the obtaining of travel documents; though he applied for travel documents through the Immigration and Naturalization Service which apparently was the usual method for obtaining travel documents; and though the Service itself did not know that any other type of application was needed or would have been useful.

Spector pointed out (at 172), "The statute might well be a trap if, for example, it required the alien to know the visa requirements of one or more countries." In sustaining the statute, the Court held that it made no such requirement. It follows that in order that the statute not be a trap, it must be shown in a prosecution under the statute, that the government requested the alien to execute a specific paper identified as the application required by the country of destination for a passport or visa and that the alien failed to comply with this request. Unless this rule is followed, then the statute does, contrary to *Spector*, require the alien to know the visa requirements of the country of destination. The record here shows that the petitioner completed the only form he was asked to complete and which was necessary for obtaining travel documents. He therefore did not fail to apply for travel documents.

B. The Evidence Negates a Failure to Depart Because Such a Failure Can Occur Only if Travel Documents Have Been Obtained or are Unnecessary

The statute punishes both a willful failure to depart and a willful failure to apply for necessary travel documents. Petitioner was convicted of both offenses solely on evidence claimed to establish the second. Also the trial court's instructions in effect directed the jury to convict of the failure-to-depart crime solely on proof of a failure to apply for travel documents. For the court instructed the jury (R. 167-8), in the only passage of the charge which contains any explanation of the failure-to-depart offense:

> "You are instructed that the statute on which this indictment is laid . . . places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's willful failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged."

Petitioner's conviction on the first count can be sustained, therefore, only on the theory that a non-departure attributable to a failure to apply for travel documents is a failure to depart within the meaning of the statute.[7] By this construction, every willful failure to apply for necessary travel documents is a double offense, since it is also inevitably a willful

[7] Even on this theory the conviction on the first count must be reversed, since, as we have seen, there was no evidence that petitioner failed to apply for travel documents. Furthermore, we later show that willfulness was not proved under either count.

failure to depart. The only way to eliminate this duplication of offenses is to construe the failure-to-depart clause as applying only to aliens who fail to depart *after travel documents are obtained or if travel documents are unnecessary.* The clause should not be applied to a non-departure resulting from a failure to apply for travel documents. This, we submit, is the correct construction of the statute. Under that construction petitioner could not have been guilty under count I, since there is no evidence that travel documents were obtained or were not needed. And since petitioner was sentenced only on the first count and not on the second (R. 175), a reversal of the conviction on the first count requires a reversal of the judgment below.

The limiting construction proposed is impelled by several principles. The canon that penal statutes must be strictly construed requires that a cumulation of offenses for the same transaction be avoided whenever reasonably possible and, if necessary, at the sacrifice of the "most literal reading." *United States* v. *Adams*, 281 U.S. 202, 204; *Bell* v. *United States*, 349 U.S. 81. As stated in *Bell* (at 83-4):

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment . . . It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . ."

Furthermore, the limiting construction is required under the principle that a general provision will normally not be construed to include specific prohibitions in the same enactment. The Court stated in *United States* v. *Chase*, 135 U.S. 255, 260:

> "It is an old and familiar rule that where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment . . . This rule applies whenever an Act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include."

The same rule was set forth in *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208:

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling . . . The construction contended for would violate the cardinal rule that if possible, effect shall be given to every clause and part of a statute."

To like effect, *MacEvoy* v. *United States*, 322 U.S. 102, 107.

Under the government's construction, the failure to apply for travel documents clause is made redundant. The same is true of other portions of the statute, such as the clause punishing failure of an alien "to present himself for deportation at the time and place required

by the Attorney General." By the government's logic, such a failure of presentation also constitutes two crimes, since it would also be a "failure to depart."

Finally, the government's reading of the statute conflicts with the Fifth Amendment's prohibition against double jeopardy. The test of double jeopardy is whether the same evidence is required to sustain conviction of the two crimes. *Gavieres* v. *United States*, 220 U.S. 338, 342; *Morgan* v. *Devine*, 237 U.S. 632, 641; *Blockburger* v. *United States*, 284 U.S. 299, 304. The government's view makes two offenses out of the identical conduct of willful failure to apply for travel documents.

C. The Evidence Negates Willfulness

Since the crimes involved are *willful* failures, it was necessary for the government to prove that the omissions were done with specific intent and with the purpose of disobeying or disregarding the law. *Hartzel* v. *United States*, 322 U.S. 680; *Screws* v. *United States*, 325 U.S. 91; *Spies* v. *United States*, 317 U.S. 492; *United States* v. *Murdock*, 290 U.S. 389; *Spurr* v. *United States*, 174 U.S. 428; *Felton* v. *United States*, 96 U.S. 699; cf, *Morissette* v. *United States*, 342 U.S. 246; *Ward* v. *United States*, 344 U.S. 923.

Congress meant willfulness to be a meaningful and substantial element of the crime. In its original form, the proposed legislation did not include the element of willfulness. This omission was rectified by the Senate Judiciary Committee before presenting the bill in the form in which it was enacted. The Committee stated (Sen. Rep. 2369, 81st Cong., 2d Sess. to accompany S. 4037, at pp. 14-15):

> "As previously reported to the Senate by the Committee on the Judiciary, H. R. 10 makes it a felony for any alien in the subversive, criminal or immoral classes against whom an order of deportation has been entered to remain in the United States after 6 months from the date of entry of such order of deportation. Section 23 of the bill modifies this penalty by including an element of willfulness."

Even if it be assumed that the government proved that the petitioner had failed to depart and had failed to apply for travel documents, there is no evidence in the record which could support findings that these failures were willful. On the contrary, the evidence negates willfulness.

In *Spector* the statute was sustained against contentions of vagueness on the assumption that the alien would be informed in some fashion of the specific steps to be required of him to apply for travel documents and that he would not be left to guess at his peril as to the proper steps to be taken. This assumption was not realized here. Moreover, if the word "willfully" in the statute is to be given meaning, there must be a showing that the accused failed to take a particular step which was requested of him or which he knew was required. No such showing was made.

In his statement which was introduced into evidence, the petitioner explained his failure to act on the ground that he had obtained the impression from his interview with Maki that he, the petitioner, need do nothing further until he heard from the Service. Petitioner then consulted with his counsel, reported this interview, and was advised to "just wait until you get official information from the immigration authorities"

(R. 103). Taken on its face, the petitioner's statement clearly establishes his innocence rather than his guilt. The government concedes as much, but argues that the jury was entitled to disbelieve the petitioner's assertions (Opp. 20-21). There was, however, no contrary evidence. Hence, assuming disbelief of petitioner, this would only have cancelled out petitioner's protestations of innocence, and left the record bare on the point. Disbelief of the petitioner cannot be converted into positive evidence of guilt.

Moreover, petitioner's assertion of good faith was corroborated by Maki's testimony and by the Service's letter of April 30. Maki, testifying for the government, acvknowledged that he told petitioner in their interview that his purpose was to obtain information to be forwarded to the Chicago office of the Service for its use in obtaining travel documents. Maki did *not* say in this interview that petitioner was also obliged to make an application for travel documents on his own. What Maki admittedly said and what he left unsaid would have induced any ordinary person to believe that the Service was assuming the task of obtaining travel documents and that therefore the individual himself need take no independent action in that direction, at least until requested.[8] The fact that Maki did not explicitly tell petitioner that he need do nothing on his own does not change the fact that what Maki

[8] In view of Maki's testimony as to what occurred at the interview, which in essence corroborated the statement of petitioner, Maki's assertion that he made no "statement that would lead Mr. Heikkinen to gather that impression" [that Heikkinen was to wait until he heard from the Service] (R. 132-3) was simply an erroneous and inadmissible opinion characterization of the natural implications of his words.

did say inevitably, though implicitly, gave the impression that the only reasonable thing for petitioner to do was to await word from the Service.

This impression was confirmed by the Service's letter to petitioner of April 30, 1952, set out *supra*, pp. 8-9. This letter, written after the interview with Maki, informed petitioner that "arrangements to effect your deportation pursuant to such order [of deportation] are being made and when completed you will be notified when and where to present yourself for deportation."

The letter then went on to quote the language of the statute verbatim and concluded as follows: "You will recognize the importance of making every effort in good faith to obtain passport or other documents so that you may effect your departure." This generalization, written in governmental prose, cannot reasonably be taken to negative the earlier sentence which advised waiting on the Service. Nor could the language of the statute inform petitioner that he could not rely on the Service and was required to apply independently and directly to the foreign country for travel documents.

If the Service actually wished petitioner to make direct application to Finland for travel documents on his own, it should have told him so in plain language. It did not do so either by letter or verbally. On the contrary, it affirmatively induced petitioner to believe that he need take no further action, and then pounced on him for the inaction it had induced.

II. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY

A. The Instructions Erroneously Failed to Define the Issue Involved

The chief factual issue before the jury was whether the petitioner's failure to take any action subsequent to his interview with Maki, was due to his honest belief that the matter was in the hands of the government, or whether this failure was with knowledge by petitioner that he was obliged to take independent action and in willful disregard of that obligation. This issue was never submitted to the jury, since the trial court gave no instructions on the point, and thereby failed to define the crucial question. Furthermore, the trial court told the jury that under the Act the petitioner "must take the necessary steps to effect his departure" (R. 168), but he never instructed the jury as to what those steps were. Thus, the jury was given no guide against which to determine whether the petitioner had or had not complied with the statute. A conviction cannot stand where it is based upon instructions which wholly fail to define the issues involved, or to submit to the jury the issue of a defendant's guilt or innocence. See *Yates* v. *United States*, 354 U.S. 298; *Bollenbach* v. *United States*, 326 U.S. 607; *Screws* v. *United States*, 325 U.S. 91; *United States* v. *O'Connor*, 237 F. 2d 466; *Tatum* v. *United States*, 190 F. 2d 612.

B. The Instructions Erroneously Eliminated Scienter

As we have seen, *supra*, p. 27, a "willful" failure to act is a failure to do what is required with specific intent and for the purpose of disobeying and disregarding the law. The thrust of the trial court's instructions was to eliminate criminal intent and willfulness as meaningful elements of the crimes and to re-

quire the jury to convict for innocent, good faith failures. The court told the jury that the petitioner "can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case" (R. 168). He also told the jury, "Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent" (R. 166).[9] Under these instructions, the petitioner's exculpatory statement that he had done nothing after the Maki interview, because he in good faith thought he should await word from the Service, was tanta-

[9] The trial court's instruction that the jury could convict even if petitioner's failure to act was a result of "innocent intent" was given despite the following which occurred prior to the summation. Defense counsel requested the following instructions: (1) "The mere presence in this country of an alien is not evidence of guilt" (R. 157); (2) "The mere failure to depart from this country within six months, or to make a timely application for travel documents, is not a violation of the law. There must be a wilful failure and refusal to depart within six months or to make timely application for travel document." (3) "There must be a specific intent to violate the statute." (R. 159). The trial court indicated his acceptance of the third instruction as requested (R. 159), and of the first two as modified in the following fashion: (1) "The mere presence in this country of an alien may or may not be evidence of his guilt" (R. 161), and (2) "The mere failure to depart from this country within six months, or to make timely application for travel documents is not a violation of the law. There must be a specific intent to violate the statute and a wilful failure and refusal to depart within six months or to make timely application for travel documents before there can be a violation of the statute involved in this case" (R. 158). The trial court, however, failed to include any of these instructions in the charge which he actually gave either verbatim or in substance.

mount to a confession of guilt. Indeed, the jury must have taken it as such since, as we have shown, there was no other evidence of guilt.

The explicit elimination of criminal intent was aggravated by the further instruction to the jury that there was no duty on the part of the government to assist the petitioner in effecting his departure, but there was an affirmative duty on the part of the petitioner to obtain travel documents (R. 168). This instruction was foreshadowed during the trial by the court's putting leading questions to a government witness and coercing affirmative responses to the same effect as the erroneous instruction (R. 133-4, 141-2).[10]

The jury, having been told that it was the petitioner's and not the government's "duty" to obtain travel documents and effect departure, had no alternative except to convict. Plainly enough, under this view, since the petitioner had not obtained travel documents and had not departed from the country, he had failed in his "duty" and was accordingly guilty. But of course, the question as to whether it was the government's or the petitioner's "duty" to secure travel documents was not the issue. Assuming that it was the petitioner's

[10] This same witness subsequently acknowledged that he did not know whether petitioner could obtain travel documents without "going through" the Service (R. 146). For this, he was rebuked by the trial court as follows: "You had better get a book and find out something about your business" (R. 146). The trial court contributed still further prejudicial confusion by questioning this witness as to the procedure for an American citizen to obtain a passport, causing the obvious inference that the petitioner should have followed the same procedure (R. 131-2).

"duty", he would nevertheless have been entitled to an acquittal if his failure to carry out that "duty" was as a result of his good faith reliance upon the belief that the government was taking the necessary steps and would inform him if it desired further action on his part.

III. THE TRIAL COURT ERRONEOUSLY DENIED ACCESS TO THE RECORDS OF THE SERVICE'S EFFORTS TO OBTAIN TRAVEL DOCUMENTS

The trial court's fallacious view that the issue in the case was one of petitioner's duty as against the government's duty also caused him to err in refusing to grant the petitioner access to the records of the Service to determine what efforts the Service had made to secure travel documents and what success had attended such efforts. In the trial court's view, petitioner was not entitled to this information, since the government "owed him no duty" (R. 19-21). In context, this ruling was tantamount to holding that the Service was entitled to act in bad faith. For all that appears, the Service may have discovered that travel documents could not be obtained, in which event the prosecution of petitioner for failing to take a useless action would indeed be shameful and offensive to due process. The situation would be even worse if the Service had in fact obtained the necessary travel documents but was withholding them from petitioner in order to make a prosecution.

IV. THE CONVICTION CANNOT STAND BECAUSE IT RESTS ON AN UNCORROBORATED CONFESSION

The sole evidence to support the conviction was petitioner's statement to the Service, given as the result of an interview which took place without benefit of counsel. There was no other evidence to show that peti-

tioner had failed to apply for travel documents or had failed to depart. There being no evidence of guilt other than this statement, the judgment below violates the rule that an uncorroborated confession will not support a conviction in the federal courts. *Isaacs* v. *United States*, 159 U.S. 487; *Opper* v. *United States*, 348 U.S. 84; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160; cf. *Warszower* v. *United States*, 312 U.S. 324.

The government in its opposition to certiorari argued (at p. 20), that this principle is not applicable to the present case because "The fact that [petitioner] failed to obtain documents and failed to leave the United States was at no point in dispute." But if the facts were not in dispute, it was only because they were established by petitioner's statement, since there was no other evidence offered by the government to prove these facts. Thus the government's case either rests upon the petitioner's statement or on nothing.

The government added (Opp., p. 20), "The only real issue was whether he acted willfully—whether he understood that he was himself under the duty to take these steps." But if this was "the only real issue," then the conviction must be reversed because the only evidence on this score was also contained in the petitioner's statement, and, as conceded by the government, this evidence proved the petitioner's innocence and not his guilt. No government witness testified to facts from which it could be inferred that petitioner understood that he was under a duty to make a separate application for travel documents directly to Finland, or that he was in any way advised that he was under such a duty. The government's dilemma is insoluble. The conviction either rests upon the petitioner's state-

ment, which is admittedly insufficient to support it, or else has no foundation at all, since the record contains no other evidence of guilt.[11]

V. THE FAILURE OF THE TRIAL COURT TO SUSPEND SENTENCE WAS AN ABUSE OF DISCRETION

The statute here is unique in its specific provision for suspension of sentence and its detailed standards to guide the courts in determining whether sentence should be suspended. Under the standards of the statute, the circumstances of this case obviously called for a suspended sentence conditioned on the petitioner's making application for travel documents and departing from the country. The petitioner was sixty-six years of age at the time he was sentenced (first standard), his failure to depart had no effect upon the national security and public peace or safety (second standard), there was no likelihood of his repeating the conduct which made him deportable (third standard), and he had cooperated with the Service in the procurement of travel documents and was willing to make further efforts to obtain such documents. In fact he had already secured the necessary travel documents to depart to Finland and had been prevented from departing only by the indictment in the present case and the consequent necessity of his remaining in this country for trial (fourth standard). The fifth and sixth standards listed in the statute have no applicability to this case in either direction.

---

[11] The reference in the government's opposition (pp. 8, 20) to the testimony that petitioner could have entered Canada obviously cannot support the verdict, since this incident occurred "a considerable time after" the period covered by the indictment (R. 87), and was accordingly not relied upon by the prosecution at the trial (R. 87).

Despite this, the trial court imposed a savage sentence of five years, in disregard of the statute's policy of mercy. He ignored the guides for sentencing as set out in the statute, and imposed a prison sentence on the basis of his own standards, which on their face are vindictive in character. The trial court recited the following considerations for his decision: (1) The petitioner had declined to go to Canada rather then to Finland;[12] (2) he had never become a citizen despite his long residence in the country; (3) he had been a member of the Communist Party; (4) he had been to Russia and had come back to the United States without a passport; (5) he was an intelligent man; (6) he had received the protection of all the laws of the United States, "rights that he wouldn't have gotten in Russia, that an American citizen wouldn't have gotten in Russia"; (7) the petitioner was guilty of violating the statute here involved (R. 174-5).

Clearly the sentence was imposed in clear violation of the statutory policy and the standards set out by Congress. Federal appellate courts do not review the severity of sentences within statutory limits. But the sentence here violates statutory limit because suspension was refused contrary to the standards of the act. This is as much a violation of the legislative will as imprisonment for a term in excess of the statutory maximum. If the conviction is sustained, the Court should, in view of the circumstances unequivocally calling for a suspended sentence conditioned on petitioner's applying for travel documents and departing

---

[12] The statute expressly gives an alien under order of deportation first choice as to the country to which he may depart. See 8 U. S. C. sec. 1253.

the country, direct imposition of a suspended sentence so conditioned. See 28 U.S.C. sec. 2106.

VI. THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED DOES NOT APPLY TO PERSONS ORDERED DEPORTED UNDER THE PROVISIONS ADDED TO THE IMMIGRATION ACT OF OCTOBER 16, 1918 BY THE INTERNAL SECURITY ACT OF 1950

Petitioner was ordered deported under a provision added to the Immigration Act of October 16, 1918, by section 22 of the Internal Security Act of 1950, 64 Stat. 1006. The statute under which he was convicted is applicable to "Any alien against whom an order of deportation is outstanding under the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137) . . ." Prior to the amendment provided in 64 Stat. 1006, neither the original Act of October 16, 1918 nor the cited amendments provided for deportation for past membership in the Communist Party, which was the basis for the order of deportation in this case. Hence, by its terms the statute does not apply to aliens who like the petitioner were ordered deported on the charge of past membership in the Communist Party.[13]

Since the statute does not cover petitioner's case by its terms, the indictment was insufficient and should have been dismissed. As a criminal statute, it should be strictly construed and not extended beyond its express terms. *United States* v. *Baltimore & O. S. W. R.*

[13] The provision as carried forward by Section 242(e) of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1252(e), by its terms covers aliens ordered deported on the ground of past membership in the Communist Party. However, this provision was not in effect at the time of the period covered by the indictment.

Co., 222 U.S. 8; *Prussian* v. *United States*, 282 U.S. 675; *United States* v. *Resnick*, 299 U.S. 207; *United States* v. *Halseth*, 342 U.S. 277. The reference to the Act of October 16, 1918, as amended, must be limited to that Act as it read at the time of consideration of the statute, and cannot include within it other changes made to the 1918 Act. *Re Heath*, 144 U.S. 92; *Hassett* v. *Welch*, 303 U.S. 303. Moreover, the specific statutory references to the amendments to the 1918 Act must be construed as limiting the applicability of the statute to those amendments. A contrary construction, and one which would include within the scope of the statute the provision for deportation added by Section 22 of the Internal Security Act of 1950, would make meaningless the reference in the statute to the specific provisions amending the 1918 Act, not including that amendment. A statutory construction which renders meaningless specific references to previous acts is not favored. *Wisconsin C. R. Co.* v. *United States*, 164 U.S. 190.

VII. THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

A. The Statute Violates the Constitution by Providing for Administrative Rather Than Judicial Determination of One of the Elements of the Offense

In *United States* v. *Spector*, 343 U.S. 169, the Court refused to consider, because the issue was not raised by counsel, whether the self-deportation statute is unconstitutional by virtue of the fact that an accused's deportability is established by an administrative finding. Justices Jackson and Frankfurter, dissenting, concluded in an opinion by Justice Jackson (at 174-180) that the statute was invalid in this respect, and Justice Black expressed tentative agreement with their posi-

tion (at 171, ftn. 2). On principle and by precedent, it is clear that the statute is unconstitutional for the reasons stated in Justice Jackson's opinion.

The statute is meant to implement the deportation laws. It contemplates punishment of an alien who has committed two transgressions: (1) engaging in conduct—in this case, joining the Communist Party—which is by law cause for expulsion; and (2) willfully failing to effectuate or facilitate departure after having been ordered expelled. The first of these elements supplies the occasion and justification for the exercise of Congressional authority. Yet the statute commits this element to administrative, rather than judicial, determination. Thereby the statute conflicts with the constitutional requirement that no person may be punished except after a judicial trial of all elements of the alleged offense.

It is true that criminal penalties may be imposed for violations of administrative rules and regulations. And it has also been held that in that situation, an accused may be limited to challenging the validity of the administrative regulation in a proceeding other than in the prosecution itself. *Yakus* v. *United States*, 321 U.S. 414. But this case is different, for it involves not an administrative regulation of general and future application, but an administrative adjudication that the particular alien has in the past committed a specific act which has become a cause for deportation. In this case, therefore, the accused is being punished not for violating an administrative regulation, but for the conduct in which he is administratively determined to have engaged. Justice Jackson pointed out this key distinction in his opinion in *Spector* (at 179):

> "It must be remembered that the deportation proceeding is an exercise of adjudicative, not rule-making power. The issue on which evidence is heard is whether the alien has committed acts which are grounds for deportation. The decision is whether he is guilty of such past conduct, and, if so, the legal result is liability to deportation. This is not the type of administrative proceeding which results in a rule or order prescribing rates or otherwise guiding future conduct."

Accordingly, the court below was wrong in considering (R. 224) that the *Yakus* case applies to this case.

The constitutional invalidity of the statutory scheme was analyzed by Justice Jackson as follows (*Spector* at 177):

> "This Act creates a crime . . . based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted.
>
> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against

> an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

In deference to Justice Jackson's dissent in *Spector*, the courts below construed the statute as if it provided that in the criminal trial the judge was required to review the record of the deportation hearing to determine whether or not that record was free from error. There is nothing in the language of the statute that authorizes such a procedure, since by its terms the statute applies to any alien "against whom an order of deportation is outstanding."

Assuming, however, that such a construction of the statute is permissible for constitutional reasons, still it does not go far enough to meet the constitutional objection. For there still remain numerous other constitutional safeguards which are required in a criminal prosecution but which, since they do not apply in an administrative deportation proceeding, are not available to one prosecuted under the statute. Thus, the following guarantees are not applicable in deportation proceedings: the right of trial by jury, guaranteed by Article III, sec. 2 and the Sixth Amendment; the right not to be prosecuted except upon indictment by grand jury, guaranteed by the Fifth Amendment; the right against double jeopardy, guaranteed by the Fifth Amendment, (cf. *Bridges* v. *Wixon*, 326 U.S. 135); the right guaranteed an accused by the Sixth Amendment to be confronted with the witnesses against him,

(cf. *Hyun* v. *Landon*, 219 F. 2d 404, aff'd 350 U.S. 990); the right to bail pending trial, (cf. *Carlson* v. *Landon*, 342 U.S. 524); the right that an accused's failure to testify is not evidence of guilt, guaranteed by the Fifth Amendment, (*United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149; *United States ex rel. Vajtauer* v. *Commissioner*, 273 U.S. 103); the due process rights that guilt must be proven beyond a reasonable doubt and may not be determined before one who acts as both judge and prosecutor (cf. *Marcello* v. *Bonds*, 349 U.S. 302; *Bilzaro* v. *Zimmerman*, 200 F. 8d 282).[14]

As Justice Jackson stated (*Spector* at 178):

> "The adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime. It is not made either by a jury trial or a court decision. All that is required by statute is a hearing before an administrative officer and that may be before one who acts both as the alien's judge and prosecutor. The finding that the alien is guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt but may be made on mere preponderance of evidence. If the determination of deportability is subject to review . . . any evidentiary attack raises only the question whether on the record as a whole there is substantial evidence in support of the order . . . No statute of limitations applies in some cases and the offense which renders the alien deportable may have occurred, but ceased, many years ago, while under statutes applicable to crimes, the same act, if a crime, long would have ceased to be subject to prosecution."

[14] So in the present case the Court below upheld the deportability of petitioner although it was established by a standard of preponderance of the evidence and in a proceeding in which the hearing officer acted as both judge and prosecutor (R. 224-5).

Although this Court has sustained administrative adjudication of deportability for the purpose of alien expulsion, it has done so on the premise that deportation is not penal in nature. In this statute, however, the fact that the alien engaged in conduct making him deportable is one of the circumstances which subjects him to lengthy imprisonment for an infamous crime. As Justice Jackson pointed out (*Spector* at 178):

> "Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. That doctrine, early adopted against sharp dissent has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry but on conduct after admittance, have been added, and the period within which deportation proceedings may be instituted has been extended. By this Act a deportation order is made to carry potential criminal consequences."

Since imprisonment for a fixed term is clearly punishment, it can not be imposed administratively, but only after a judicial trial in which a jury determines the issue of deportability. This appears not only from principle, but also from *Wong Wing* v. *United States*, 163 U.S. 228. The controlling nature of that case was described by Justice Jackson in *Spector* as follows (at 176-7):

> "Thus the Court held that the Constitution prohibited *for criminal purposes* a judicial determination without a jury that the alien was illegally present in the United States. It held that the facts which made his presence illegal must be established to the satisfaction of a jury, although the actual case before it seems to have presented

> only the narrowest and simplest issues, namely, whether the alien was a Chinaman and whether he was here. If so, his entry and his presence at any time were illegal. In contrast, this Act incriminates those whose presence here is entirely legal but for guilt of some forbidden conduct since entry. Certainly illegal presence under present laws involves a much more trialworthy issue than in Wong Wing's case."

The fact is that the statute, by providing for administrative determination of one of the elements of the offense, is pro tanto a bill of attainder, prohibited by Article I, section 9, and defined as "a legislative Act which inflicts punishment without judicial trial." *Cummings* v. *Missouri*, 71 U.S. 277, 323.

The court below was mistaken in its reliance (R. 224) on *Cox* v. *United States*, 332 U.S. 442. That case affirmed convictions for violation of the military draft act where the accused had been denied exempt classifications by their draft boards without permiting a de novo jury determination of the classifications. But administrative classification for draft purposes does not involve a determination of whether the individual was guilty of past misconduct. A draft exemption is a grant of a privilege excusing the individual from an obligation which is applicable to all citizens in his age group.[15] Obviously administrative determination that a person is not entitled to an exceptional privilege differs vastly from an administrative determination that the person is guilty of such past misconduct as to subject him to

[15] It is this special nature of an application for a privileged classification that underlies the ruling of this Court that an applicant for such privilege is not entitled to see the FBI report upon which his claim is rejected. *United States* v. *Nugent*, 346 U. S. 1.

deportation. In the draft cases, the government's case is complete when it shows refusal to accept the military service, and the claim that an exemption should have been granted is defensive. Under the present statute, however, deportability by reason of past conduct is an essential element of the offense. It therefore must be affirmatively proved, and, this being the case, it must be proved in a judicial proceeding before a jury, not in an administrative proceeding.

B. The Statute Is Invalid by Reason of Its Imposition of Criminal Punishment for Past Membership in the Communist Party

As we have seen, a necessary element of the crime is the alien's deportability. The statute does not apply to all deportees, but only to those deported for certain causes. In petitioner's case the cause for his order of deportation was his alleged past membership in the Communist Party as provided in the Internal Security Act of 1950.[16]

Expulsion of a resident alien for such past conduct which when engaged in was not cause for deportation and which does not rationally justify a conclusion that his continued residence will be detrimental to the community, has been sustained against charges of lack of due process and violation of the prohibition against ex post facto laws, on the grounds that deportation is not penal and that there are few if any due process restrictions on Congress' authority to determine which aliens are undesirable residents. *Galvan* v. *Press*, 347

[16] The petitioner was also ordered deported upon the ground that he had last entered the United States without an immigration visa. But deportability on that ground does not subject an alien to the provisions of the self-deportation statute.

U.S. 522; cf. *Harisiades* v. *Shaughnessy*, 342 U.S. 580. As Justice Jackson pointed out in *Spector* (at 178), supra, p. 44, this reasoning completely breaks down when, as in the case of this statute, imprisonment is a consequence of conduct causing deportability. There can be no justification for not applying to this statute the substantive restrictions which the Constitution imposes on Congress' power to define and punish crimes.

Here, the petitioner has been convicted for a crime of which one element was that he belonged to the Communist Party between 1922 and 1930 (supra, p. 6 ftn: 4). Yet the statute punishing him for this conduct, in conjunction with other conduct, was not enacted until 1950. Moreover, at the time petitioner belonged to the Communist Party, that was not a cause for deportation and it was not made a cause for deportation until 1950. Clearly, therefore, petitioner is being punished by an ex post facto law. Furthermore, since he is being punished for past membership in a specifically named organization, he is being imprisoned under a bill of attainder. Also, his punishment for organizational membership violates the First Amendment. And since petitioner's past Communist Party membership standing alone does not supply a rational basis for concluding that his continued presence in the country is detrimental, cf. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, *Wieman* v. *Updegraff*, 344 U.S. 183; it violates substantive due process to imprison him for failing to depart from the country.

Suppose Congress enacts a statute that any alien who has ever been a member of the Communist Party is guilty of a felony if he does not within six months make good faith efforts to leave the country. This legislation would be a glaring violation of the pro-

hibitions against ex post facto laws and bills of attainder, of substantive due process, and of the First Amendment. The statute here involved has the same defects. It differs from the hypothetical legislation only by reason of the fact that it provides for administrative determination of the question of Communist Party membership. But this circumstance, as we have seen, merely adds procedural constitutional vices; it can not cure the violations of substantive restrictions of the Constitution.

The brief for petitioner in *Rowoldt* v. *Perfetto*, No. 5 this Term,[17] states the grounds for considering unconstitutional the statute requiring the deportation of aliens who had been members of the Communist Party. If those arguments prevail, then obviously the conviction of petitioner must be reversed because it is founded upon an unconstitutional order of deportation. But if the Court, adhering to its views in *Galvan*, sustains the deportation statute on the ground that deportation does not inflict punishment and is not governed by ordinary due process limitations, the arguments in *Rowoldt* remain applicable to the question of whether the self-deportation statute is invalid by reason of inflicting punishment for an offense of which one element is past membership in the Communist Party. Accordingly, we rely upon the arguments in petitioner's brief in *Rowoldt* to support our positions here that (1) the deportation order against petitioner is unconstitutional, and (2) in any event it is unconstitutional to imprison petitioner for a crime bottomed on the deportable act here involved.

---

[17] The case was originally No. 34, October Term, 1956, but it was set down for reargument for this Term 354 U. S. 934.

CONCLUSION

The judgment below should be reversed with directions that the indictment be dismissed, or a judgment of acquittal entered.

Respectfully submitted,

DAVID REIN
JOSEPH FORER
FORER & REIN
711 14th Street, N. W.
Washington, D. C.

M. MICHAEL ESSIN
623 North Second Street
Milwaukee, Wisconsin

Attorneys for Petitioner.